ZEN ESTATES SDN BHD v. BADAN PENGURUSAN BERSAMA SUBANG PARKHOMES

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
AZIMAH OMAR JCA
WONG KIAN KHEONG JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-140-01-2023]
28 JANUARY 2025

Abstract – *The developer has a bounden duty to ensure that the requisite maintenance fees and sinking fund charges are billed and collected. It cannot be the intention of the law that a developer can, at its own whims and fancies, omit and write off any portion of the maintenance fees and sinking fund charges. Such an arbitrary discretion directly transgresses and is ultra vires the statutory duty to collect, pursuant to s. 9(3) of the Strata Management Act 2013. If a developer decides to omit any portion of maintenance fees and sinking fund charges owed by the purchasers, then the developer must absorb the omitted sum and become personally liable to pay the said omitted sum on behalf of the purchasers.*

STRATA PROPERTY: *Strata management – Developer – Statutory duties – Breach – Duty to collect maintenance fees and sinking fund charges – Developer omitted and wrote off portion of maintenance fees and sinking fund charges – Whether allowed to – Whether developer must absorb omitted sum – Whether developer personally liable to pay omitted sum on behalf of purchasers – Whether developer had breached statutory duty – Strata Management Act 2013, ss. 9(3) & 12*

STRATA PROPERTY: *Strata management – Developer – Statutory duties – Breach – Duty to transfer balance within sinking fund and maintenance fees accounts to joint management body ('JMB') – JMB established and developer's management period expired – Developer failed to transfer balance within maintenance fees and sinking fund accounts to JMB – Whether developer properly accounted for and/or collected appropriate fees and sinking fund charges owed – Whether developer breached statutory duty – Strata Management Act 2013, ss. 7(2), 15(1)(a) & (2)*

The appellant was the developer of Subang Parkhome Condominium. Prior to the establishment of the joint management body ('respondent'), the appellant was statutorily responsible for the management of the residences and common properties of the condominium; this included the duty to collect maintenance fees and sinking fund charges. The appellant's management period spanned across two to three years post delivery of vacant

possession. The appellant had pledged: (i) to absorb (to omit) the maintenance fees and sinking fund charges for the first-year post delivery of the vacant possession; and (ii) that it had billed itself as a developer for the first-year maintenance fees for phase 2 of the development. Subsequent to the collection of the maintenance fees and sinking fund charges during the appellant's management period, it was statutorily mandatory for it to transfer the accumulated sums to the respondent upon its establishment. The total receivables to be transferred to the respondent was at least RM1,872,625, with late payment interest ('initial debt amount'). Out of the entire initial debt amount, a majority amount of RM1,091,204.76 was personally owed by the appellant as the owner of six unsold parcel units of the condominium. Prior to proper auditing of the accounts, the appellant attempted to unilaterally 'settle' the sum owing for the pledged free first-year maintenance fees and sinking fund charges for phase 2 of the condominium, by enclosing a cheque for RM263,196.62. The respondent rejected the said sum and insisted that the appellant transfer the initial debt amount. When nothing was forthcoming, the respondent proceeded to claim against the appellant, at the High Court, for the maintenance fees and sinking fund charges for both sold and unsold units in phases 1 and 2, in the sums of RM1,220,277.88 and RM657,134.51, respectively. The High Court allowed the claim. Hence, the present appeal. The issues that arose for adjudication were whether the appellant had breached its statutory duties to: (i) collect the maintenance fees and sinking fund charges for both the sold and unsold units in phases 1 and 2 of the condominium; and (ii) transfer the appropriate balance within the sinking fund and maintenance fees' accounts to the respondent.

Held (dismissing appeal; affirming decision of High Court)
Per Azimah Omar JCA delivering the judgment of the court:

(1) The appellant did not perform its statutory duty, pursuant to s. 9(3) of the Strata Management Act 2013, to collect the maintenance fees and sinking fund charges from both the purchasers and itself, as the developer. Since the non-performance was motivated by the pledge to omit (absorb) the maintenance fees and sinking fund charges, it was only just and appropriate for the appellant to bear the pledged first-year maintenance fees and sinking fund charges on behalf of the purchasers, for the sold units, and on behalf of itself, for the unsold units. The appellant could not, on one breath, omit and not collect the maintenance fees and sinking fund charges from the purchasers and, on the same singular breath, blame the purchasers for not paying their maintenance fees and sinking fund charges. Estoppel should set in to bar the appellant from adopting two contradictory stances at one singular time. (paras 57 & 59)

(2) On top of not refuting the respondent's letters of demand and statements of accounts, the appellant's own directors had admitted to the accuracy and correctness of the respondent's accounts, figures and calculations. It would be gravely unjust to allow the appellant to now contradict its own prior admissions and acknowledgments. The appellant failed to duly transfer the appropriate balance within the maintenance fees and sinking fund accounts to the respondent. Despite the appellant's insistence that it had already transferred all the monies from the two accounts to the respondent, the glaring balance of receivables admitted to not have been transferred to the respondent could only mean that the appellant had not properly accounted for and/or collected the appropriate fees and sinking fund charges that were owed by the appellant itself. (paras 63, 65 & 66)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC

Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA

Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal [2023] CLJU 827; [2023] 1 LNS 827 CA

Kgn Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA

Legislation referred to:

Strata Management Act 2013, ss. 2, 7(2), 9(3), 12(2), 15(1)(a), (2)

For the appellant - Cheryl Tay Shieh Chin, Kevin Wong Gia Meng, Carmen Liao Jia Wen & Sherine Chan Shin Yuh; M/s Jason Teoh & Partners

For the respondent - Stephanie Ang Jia Yen & Hemashantini Satiavanan; M/s Julian Stephanie

[Editor's note: For the High Court judgment, please see Badan Pengurusan Bersama Subang Parkhomes v. Zen Estates Sdn Bhd [2023] CLJU 2983; [2023] 1 LNS 2983 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Azimah Omar JCA:

Introduction

[1] The appeal before us is an appeal by the appellant against the High Court's decision allowing the respondent's claims against the appellant-developer for numerous breaches of statutory duties of a developer during the developer management period (prior to the handover to the respondent-joint management body ("JMB")) as well as after the appellant's handover of the "development area" (Subang Parkhome Condominium) to the respondent.

[2] It is plain and trite law that prior to the formation of the JMB (during the developer management period), it is statutorily incumbent upon the appellant-developer to keep distinct accounts and collect maintenance fees as well as sinking fund charges from the parcel owners (and from the developer itself in respect of unsold units).

[3] We are most aware that the developer ought not be blamed or be burdened with outstanding maintenance fees or sinking fund charges remain that unpaid by errant parcel purchasers. However, the facts of the appeal before us are certainly a far cry from a typical case as the appellant-developer here had intentionally pledged to absorb and not collect (to omit) any maintenance fees or sinking fund from parcel purchasers for the first year after delivery of vacant possession.

[4] Thus, specific to the circumstances of the appeal before us, the appellant-developer's failure to account for and to fully settle the first year's maintenance fees and sinking fund charges (for both sold and unsold units) was indeed a clear instance of breach of its statutory duties.

[5] In furtherance of the appellant-developer's statutory breaches during the developer's management period, it was also undisputed that the appellant had (in breach of its statutory duty) failed to timeously transfer the sums of receivables in the maintenance fees and sinking fund accounts to the respondent one month before the establishment of the respondent as the JMB at the first annual general meeting.

[6] It also remains undisputed and even admitted by the appellant that the respondent-JMB was established as early as 25 June 2016 and that the appellant had only furnished its signed audited financial report and the relevant statements of account to the respondent on 8 January 2018 (which was at least a delay of 18 months).

[7] The audited financial report was prepared by an auditing firm which was appointed by the appellant itself. In fact, the appellant's own directors have unequivocally signed, verified, and admitted the correctness and accuracy of the figures and receivables that were supposed to be transferred to the respondent-JMB (of which now the appellant somehow contradictorily insists to impugn despite its prior admission).

[8] During the hearing of the appeal before us, it was also admitted by learned counsel for the appellant that the appellant had at least thrice failed to refute or even respond to the respondent's notices of demand for remittance of the receivables amount as stated within the signed audited financial report, aging reports, and statements of account. In any case, it is only apt for us to appreciate the full breadth of the essential facts before we delve into our deliberations.

Brief Facts

[9] The appellant, Zen Estates Sdn Bhd (formerly known as Sendi Bangga Development Sdn Bhd) ("the developer"), was the developer of Subang Parkhome Condominium ("SPH/the condominium").

[10] Prior to SPH's first AGM to establish the respondent-JMB, the developer was statutorily responsible for the management of the residences as well as common properties of SPH (which includes the duty of collecting maintenance fees and sinking fund charges during the developer's management period prior to the establishment of the JMB) (see s. 9(3) of the Strata Management Act 2013 ("SMA")):

> (3) The powers of the developer during the developer's management period shall be as follows:
>
> a) to **collect the Charges from the parcel owners** in proportion to the allocated share units of their respective parcels;
>
> b) **to collect** the contribution to the **sinking fund** from the **parcel owners;** … (emphasis added)

[11] The development of the condominium was conducted over two separate phases of development. Vacant possession for phase 1 was delivered *circa* July 2013 while phase 2 was delivered *circa* October 2014 ("VP").

[12] The JMB was established during the first AGM on 25 June 2016. Thus, the developer's management period spanned across two to three years post delivery of VP.

[13] It was admitted that the appellant-developer had pledged to absorb (to omit) the maintenance fees and sinking fund charges for the first year post-delivery of VP. This was expressly admitted by the appellant's own witness as it was readily admitted by the appellant's own director that the developer had not billed any purchasers for either sinking fund charges or maintenance fees in the first year post-delivery of VP.

[14] In furtherance of the same pledge, it was also readily admitted that the appellant had billed itself as developer for the first year maintenance fees for phase 2 of the development. Thus, due to the appellant's unique pledge to absorb the first year's maintenance fees and sinking fund charges, the appellant had effectively put itself in a unique position wherein the appellant, as developer, would be responsible to bear and pay the maintenance fees and sinking fund charges for both the sold and unsold units of the condominium (limited to the first year's maintenance fees and sinking fund charges inclusive of consequent penalties incurred for late payments).

[15] The developer's duty under s. 9(3) of the SMA to collect maintenance fees and sinking fund charges also encompasses the developer's duty to collect the fees and charges from the developer itself and not merely the purchasers. This is because the definition of a 'parcel owner' under s. 2 of the SMA also includes the developer for units that had not been sold off:

A "parcel owner" means the purchaser or **the developer in respect of those parcels** in the development area **which have not been sold** by the developer; (emphasis added)

[16] In fact, the developer's statutory responsibility to collect maintenance fees and sinking fund charges from itself (as owners of unsold units) was also B expressly entrenched in s. 12(2) of the SMA:

(2) **The developer shall pay the Charges, and contribution to the sinking fund,** in respect of those **parcels** in the development area **which have not been sold,** being a sum equivalent to the Charges, and contribution to the sinking fund, payable by the purchasers to C the developer had the parcels been sold. (emphasis added)

[17] Subsequent to the collection of the maintenance fees and sinking fund charges during the developer management period, it is statutorily mandatory for a developer to transfer all of the accumulated sums (within distinct maintenance fees account and sinking fund account) to the JMB upon the D establishment of the JMB during the first AGM (see s. 15(1)(a) of the SMA):

A **developer** shall, before the developer's management period expires -

a) **transfer all balances of moneys in the maintenance account and the sinking fund account,** after payment of all the expenditure which have been properly charged to the accounts, **to the joint** E **management body;** (emphasis added)

[18] Aside from transferring monies, the appellant-developer is also statutorily required to furnish upon the respondent proper audited accounts within three months after the expiration of the developer management period (see s. 15(2) of the SMA):

F

If only unaudited accounts have been handed over under subparagraph (1)(b)(ii), **the developer shall, not more than three months after the expiry of the developer's management period, hand over to the joint management body the audited accounts** up to the date of transfer of the balances of moneys referred to in paragraph (1)(a). (emphasis added)

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[19] Considering the statutory provisions above (as well as the appellant's unique pledge), the appellant's statutory duty shall encompass the following:

(i) to collect maintenance fees and sinking fund charges against the appellant itself as developer *cum* owner of the unsold units in phase 1 H and phase 2 of the condominium;

(ii) to collect maintenance fees and sinking fund charges against the appellant itself as developer under the appellant's unequivocal pledge to absorb/omit the first-year maintenance fees and sinking fund charges chargeable against the purchasers of the sold units in phase 1 and phase I 2 of the condominium;

(iii) before the developer's management period lapses, the appellant statutorily must transfer the balances within the maintenance fee account and the sinking fund account to the respondent-developer; and

(iv) within three months from the expiration of the developer's management period, the appellant shall furnish unto the respondent the proper audited accounts.

[20] As far as the parties' positions are concerned, the *factum* of statutory breaches committed by the appellant was either largely irrefutable or even admitted.

[21] Firstly, it was readily admitted by the appellant that the appellant had failed to abide by the statutory deadline to furnish the audited accounts within three months from the expiration of the developer's management period. Under s. 7(2) of the SMA, the developer's management period expires one month after the establishment of the JMB.

[22] As we have mentioned earlier, the JMB was formed on 25 June 2016. Thus, the developer's management period shall expire on 25 July 2016. The appellant had only furnished the audited accounts on 8 January 2018 (which was at least a delay of 17 months). And this court is minded to note that this delay transpired despite the respondent's repeated reminders against the appellant to timeously hand over the audited accounts.

[23] Secondly, it must be emphasised that the entirety of the appellant's defence was by and large merely a defence on quantum and not at all on liability. The appellant had readily admitted owing sums of monies which were unlawfully uncollected but remained adamant to poke 'mathematical holes' into the respondent's unwavering calculations as to the appellant's owings to the respondent.

[24] However, it was obvious that the appellant had largely failed to produce its own mathematical calculation of its owings. The appellant had only focused its efforts to draw comparisons between the sums claimed by the respondent at different points in time (which logically would evolve as more late payment interest would be incurred over time).

[25] There were three main documents that were furnished by the appellant itself, which all were prepared by the appellant's own appointed third-party independent auditing firm, Ket & Co, and property management company, JL Facilities Sdn Bhd:

(i) audited report for year ended 30 June 2016;

(ii) two aging reports as at 30 June 2016 for phase 1 and phase 2 of the condominium; and

(iii) the appellant's statements of account for phase 1 (W-DEV-SE) and phase 2 (W-DEV-SE 2) both calculated as at 30 June 2016.

[26] All the calculations and amounts stated in the audited report (also supported by the aging reports and the statements of account) were expressly acknowledged and admitted of its accuracy and correctness by the appellant's own directors. This was expressly declared within the directors' statutory declaration within the audited report itself:

SUBANG PARKHOMES
(BUILDING MAINTENANCE ACCOUNT)
UNDER THE CUSTODY OF SENDI BANGGA DEVELOPMENT SDN. BHD.

STATEMENT BY THE DEVELOPERS

In our opinion, the financial statements set out on pages 7 to 27 are properly drawn up so as to exhibit a true and fair view of the state of affairs of the Building Maintenance Account of Subang Parkhomes in accordance with Malaysian Private Entities Reporting Standard and the requirements of the Strata Management Act 2013 (Act 757) in Malaysia which is under custody of Sendi Bangga Development Sdn. Bhd. as at 30 June 2016 and of the results for the financial period from 1 July 2015 to 30 June 2016.

Signed on behalf of the Board in accordance with a resolution of the directors,

LIM PUAY FUNG
Director

LIM POH YIT
Director

Date: 0 8 JAN 2018

STATUTORY DECLARATION

I, LIM PUAY FUNG, the director primarily responsible for the financial management of Building Maintenance Account of Subang Parkhomes, do solemnly and sincerely declare that the financial statements set out on pages 7 to 27 are, in my opinion, correct and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1960.

Subscribed and solemnly declared by)
the abovenamed at Kuala Lumpur in)
the State of Federal Territory this)
of 0 8 JAN 2018

LIM PUAY FUNG

Before me,

PESURUHJAYA SUMPAH
No: W685
TANG SOOK WEI
MALAYSIA

No. 14-1 (Tingkat 1), Jalan Kuchai Maju 16
(Jalan 6/116B), Kuchai Entrepreneur's Park
Jalan Kuchai Lama, 58200 Kuala Lumpur
Wilayah Persekutuan,
MALAYSIA.

[27] Thus, it was readily admitted by the appellant itself that the total receivables that were supposed to be transferred to the respondent was at least RM1,872,625 (with late payment interest) as at 30 June 2016 ("initial debt amount"):

7. RECEIVABLES FROM PURCHASERS

This represents the amount due from purchasers and can be analyses as:-

	30.6.2016 RM	30.6.2015 RM
Service charges	1,509,778	669,513
Sinking fund	286,583	167,898
Quit rent	4,064	3,486
Fire insurance	44,083	29,507
Legal fee	223	334
Late payment interest	30,669	2,723
Others	72,933	24,455
	1,948,333	897,916
Advance payment from purchasers	(75,708)	(27,124)
	1,872,625	870,792
Transfer to Joint Management Body (Note 19)	(1,872,625)	-
	-	870,792

Aging of receivables from purchasers are as follows:

	30.6.2016 RM	30.6.2015 RM
Debts for current month	114,864	360,253
Debts between 1 to 2 months	117,578	81,728
Debts between 2 to 3 months	92,571	276,118
Debts between 3 to 4 months	78,416	44,521
Debts between 4 to 5 months	86,296	31,991
Debts more than 5 months	1,458,608	103,305
	1,948,333	897,916
Advance payment from purchasers	(75,708)	(27,124)
	1,872,625	870,792
Transfer to Joint Management Body (Note 19)	(1,872,625)	-
	-	870,792

Receivable from purchasers represent amount receivable from parcel purchasers.

[28] It was explained by the respondent and even admitted by the appellant, that the initial debt amount, *inter alia,* consisted of:

(i) the maintenance fees and sinking fund charges upon the unsold units in phase 1 that were still within the ownership of the appellant as developer to the amount of RM379,387.61 (as per the aging report for phase 1 as at 30 June 2016);

(ii) the maintenance fees and sinking fund charges upon the unsold units in phase 2 that were still within the ownership of the appellant as developer to the amount of RM711,817.15 (as per the aging report for phase 2 as at 30 June 2016); and

(iii) the pledged (omitted) free first-year maintenance fees and sinking fund charges upon the sold and unsold units in phase 1.

[29] During trial, the appellant's own director (DW1) expressly admitted that out of the entire initial debt amount of RM1,872,625, a majority amount of RM1,091,204.76 was personally owed by the appellant as the owner of the six unsold parcel units in phases 1 and 2 of the condominium ("unsold unit receivables").

[30] It was exactly this 'shortfall' between the initial debt amount and the unsold unit receivables that the appellant had touted as the most egregious 'inconsistency' and lack of evidence as the respondent allegedly either could not explain the shortfall or had also claimed for receivables that should have been charged against and paid for by errant purchasers of the sold units of the condominium. However, the appellant's own admission as to its pledge of the free first year maintenance fees and sinking fund charges was more than sufficient to rationalise the shortfall. The shortfall can simply be explained by:

(i) continuously accruing late payment interest upon the unsold unit receivables that still remained overdue; and

(ii) the addition of the pledged free first-year maintenance fees and sinking fund charges that the appellant itself had agreed to absorb (that already stood at at least RM483,186 as at 30 June 2018).

[31] Thus, the appellant's allegation that the respondent had unlawfully insisted the appellant to bear the sinking fund charges and maintenance fees unpaid by errant purchasers was entirely erroneous.

[32] Prior to the proper auditing of the accounts, the appellant had attempted to unilaterally 'settle' what the appellant arbitrarily believed to be the sum owing for the pledged free first year maintenance fees and sinking fund charges for phase 2 of the condominium by enclosing a cheque for RM263,196.62 *via* a letter dated 1 November 2017.

[33] In clear rejection of the appellant's arbitrarily calculated settlement sum, the respondent had issued a letter of demand dated 16 March 2018 ("first 2018 LOD") insisting that the appellant to transfer the initial debt amount (the admitted receivables under the audited account) to the respondent-JMB. It was admitted by the appellant's own learned counsel during the appeal hearing that the appellant had not responded to this first 2018 LOD by the respondent. Nor did the appellant tender any evidence of a response to the first 2018 LOD.

[34] Due to the appellant's silence and continued refusal to pay, the respondent was pressed to instruct its solicitors at that time to issue out a second letter of demand dated 15 August 2018 ("second 2018 LOD").

[35] Under the second 2018 LOD, the outstanding sinking fund charges and maintenance fees of the six unsold units owned by the developer were updated to include late payment interests as at 10 August 2018.

[36] For accuracy's sake, the second 2018 LOD also provided distinct calculation as to the outstanding pledged free first-year maintenance fees and sinking fund charges as at 30 June 2018. This second 2018 LOD also already accounted for the partial payment by the appellant for phase 2 of the condominium on 1 November 2017, in which the respondent had accepted without prejudice to the unpaid remainder sum:

(i) the maintenance fees and sinking fund charges for the unsold units in phase 1 that were still within the ownership of the appellant as developer to the amount of RM982,318.99 (as per the aging report for phase 1 as at 10 August 2018);

(ii) the maintenance fees and sinking fund charges upon the unsold units in phase 2 that were still within the ownership of the appellant as developer to the amount of RM624,709.67 (as per the aging report for phase 2 as at 10 August 2018); and

(iii) the pledged free first-year maintenance fees and sinking fund charges upon the sold and unsold units in phase 1 to the amount of RM483,186 as at 30 June 2018.

[37] In a similar fashion of admitting to the respondent's claim, the appellant had neither refuted nor even responded to the respondent's second 2018 LOD.

[38] Considering the appellant's continued silence and admission upon the respondent's claim, the respondent was left with no other option but to initiate a suit against the appellant. In preparation of the suit, the respondent updated and prepared the appellant's statements of account to clearly reflect the maintenance fees and sinking fund charges still remain owed by the appellant under phase 1 and phase 2 of the condominium as at 15 April 2019:

(i) the maintenance fees and sinking fund charges in phase 1 (for unsold units still owned by the appellant + pledged free first-year absorbed by the appellant for both sold and unsold units to the amount of RM645,358 + late payment interest) to the total amount of RM1,233,114.78 as at 15 April 2019; and

(ii) the maintenance fees and sinking fund charges upon the unsold units in phase 2 that were still within the ownership of the appellant as developer to the amount of RM673,141.63 as at 15 April 2019;

[39] The respondent, *via* its solicitors at the time, issued yet another letter of demand dated 2 May 2019 ("2019 LOD") against the appellant on the basis of (and attaching) the two statements of account as at 15 April 2019. In similar admission of the first two 2018 LODs, the appellant had never meaningfully or substantially refuted or responded against the 2019 LOD and the statements of account.

[40] The appellant's solicitor at the time had only stated that they were 'in the midst of taking instructions' *via* a reply letter dated 6 May 2019. There were no follow-up by the appellant or the appellant's solicitor since then (which left the 2019 LOD and statements of account totally unanswered and undisputed by the appellant).

[41] The respondent thereafter commenced the suit below *circa* 2019 on the basis of the amounts reported within the statement of accounts as at 15 April 2019 mentioned above.

[42] In preparation for trial *circa* 2022, the respondent had engaged the same auditing firm to prepare a fresh audited report so as to give the court below full clarity as to the calculation of the appellant's debt up to date. Thus, Ket & Co prepared a specific agreed upon procedures auditor's report dated 19 May 2022 ("AUP report") to specifically finalise and update the calculation and amounts of receivables that the appellant was statutorily required to transfer to the respondent-JMB. In full earnesty and honesty, the respondent frankly and candidly furnished the court below with the AUP report despite the fact that the AUP report had reported a slight decrease of the final amount.

[43] The respondent, in full honesty, had explained that the slight decrease in the sums was occasioned by the mistaken imposition of late payment interest on other receivables (insurance, utilities, and other charges) aside from the maintenance fees and sinking fund charges:

KET & CO.
CHARTERED ACCOUNTANTS,

6. **Summary of Our Findings**

Enclosed are the re-computed claims after on the agreed procedures:

No.	Particulars	Claims on Phase I	Claims on Phase II	Total Claims
		RM	RM	RM
1.	The overdue balances and interest based on transfer documents from Developer	475,553.34	881,371.48	1,356,924.82
2.	Overdue balances and LPI of ex-owners (sub-sale units) not settled/transferred by Developer	23,579.55	6,534.81	30,114.36
3.a.	1st year service charges omitted	373,683.00	-	373,683.00
3.b	1st year sinking fund charges omitted	271,675.00	-	271,675.00
4.	Partial settlement by Developer	-	(263,196.62)	(263,196.62)
		1,144,490.89	624,709.67	1,769,200.56
5.	LPI for the period 1.7.2018 to 31.3.2019	75,786.99	32,424.84	108,211.83
		1,220,277.88	657,134.51	1,877,412.39

Enclosed are the original claims before the agreed procedures:

No.	Particulars	Claims on Phase I	Claims on Phase II	Total Claims
		RM	RM	RM
1.	The overdue balances and interest based on transfer documents from Developer	475,553.34	881,371.48	1,356,924.82
2.	Overdue balances and LPI of ex-owners (sub-sale units) not settled/transferred by Developer	23,579.55	6,534.81	30,114.36
3.a.	1st year service charges omitted	373,683.00	-	373,683.00
3.b	1st year sinking fund charges omitted	271,675.00	-	271,675.00
4.	Partial settlement by Developer	-	(263,196.62)	(263,196.62)
		1,144,490.89	624,709.67	1,769,200.56
5.	LPI for the period 1.7.2018 to 31.3.2019	88,623.89	48,431.96	137,055.85
		1,233,114.78	673,141.63	1,906,256.41

Enclosed are the differences identified during the agreed procedures:

No.	Particulars	Claims on Phase I	Claims on Phase II	Total Claims
		RM	RM	RM
1.	The overdue balances and interest based on transfer documents from Developer	-	-	-
2.	Overdue balances and LPI of ex-owners (sub-sale units) not settled/transferred by Developer	-	-	-
3.a.	1st year service charges omitted	-	-	-
3.b	1st year sinking fund charges omitted	-	-	-
4.	Partial settlement by Developer	-	-	-
5.	LPI for the period 1.7.2018 to 31.3.2019	12,836.90	16,007.12	28,844.02
	Total differences identified	12,836.90	16,007.12	28,844.02

[44] In fact, the AUP report in clear figures and calculation had explained the manner in which the pledged free first-year maintenance fees and sinking fund charges (to be absorbed by the appellant) were calculated:

A

5. **Our Findings (Continued)**

5.3 1st year maintenance fund (net of maintenance fund expenses) and sinking fund (net omitted (Continued)

B

5.3a 1st year maintenance fund (net of maintenance fund expenses) omitted

Purpose:
Ascertain the accuracy of Attachment C Document 234.

Procedure 1
Ascertain the computation of omitted service charges of RM1,630,048

C

The total square feet used for the computation agreed with the Owners Listing provided by current property management dated 1 June 2017 with net identifiable units totalling to a billable size of 452,791 square feet. Exhibit B

The rate of monthly service charges of RM0.30 per square foot agreed with the minutes of the first Annual General Meeting held on 25 June 2016. Exhibit A

D

All service charges will be borne by Developer instead of owners pursuant to the letter representation from Developer. Exhibit C

The certificate of completeness and compliance was not made available and hence, the date of vacant passion is accounted with effect from 1 July 2013, which is the commencement date of the first audited financial statements.

E

The total number of months is determined as 12 months from 1 July 2013 to 30 June 2014.

Reported maintenance fund for the first year (12 months) since vacant possession from 1 July 2013 was RM1,630,048. The said reported amount of RM1,630,048 in Attachment C Document 234 is agreed with the computed amount.

F

Procedure 2
Check the maintenance fund expenses borne by Developer

The maintenance fund expenses included in Attachment C Document 234 representing property maintenance of RM630,824 and utilities RM30,067 as well as administration of RM10,197 for the financial period from 1 July 2013 to 31 March 2014. The said amount was verified and agreed with the audited financial statements Exhibit D for the period from 1 July 2013 to 31 March 2014.

G

The maintenance fund expenses included in Attachment C Document 234 representing property maintenance of RM449,882 and utilities RM125,322 as well as administration of RM10,073 for the financial period from 1 April 2014 to 30 June 2015. The said amount was verified and agreed with the audited financial statements Exhibit E for the period from 1 April 2014 to 30 June 2015.

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5. **Our Findings (Continued)**

5.3 **1st year maintenance fund (net of maintenance fund expenses) and sinking fund (net) omitted (Continued)**

5.3a **1st year maintenance fund (net) omitted (Continued)**

Procedure 3
Perform arithmetic checks on net maintenance income omitted

Total maintenance fund expenses reported in Attachment C [Document 234] for the two financial periods above was RM1,256,365. The said reported amount is agreed with the computed amount.

Perform computation of the service charges omitted (RM1,630,048) less maintenance fund expenses absorbed by Developer (RM1,256,365) and the result of RM373,683 agreed with the claim in Attachment C [Document 234].

5.3b **1st year sinking fund omitted**

Purpose:
Ascertain the accuracy of Attachment C [Document 234].

Procedure 1 – Ascertain the computation of omitted service charges of RM271,675
The total square feet used for the computation agreed with the Owners Listing provided by current property management dated 1 June 2017 with net identifiable units totalling to a billable size of 452,791 square feet. [Exhibit B]

The rate of monthly service charges of RM0.05 per square foot agreed with the minutes of the first Annual General Meeting held on 25 June 2016. [Exhibit A]

All service charges will be borne by Developer instead of owners pursuant to the letter representation from Developer. [Exhibit C]

The certificate of completeness and compliance was not made available and hence, the date of vacant passion is accounted based on 1 July 2013, which is the commencement date of the first audited financial statements.

The total number of months is determined as 12 months from 1 July 2013 to 30 June 2014

Reported sinking fund for the first year (12 months) since vacant possession from 1 July 2013 was RM271,675. The said reported amount of RM271,675 in Attachment C [Document 234] is agreed with the computed amount.

[45] Thus, upon recalculation from the respondent's side, the respondent's claim stood at the following amounts:

(i) the maintenance fees and sinking fund charges in phase 1 (for unsold units still owned by the appellant + pledged free first year absorbed by the appellant for both sold and unsold units to the amount of RM645,358 + late payment interest) to the total reduced amount of RM1,220,277.88; and

(ii) the maintenance fees and sinking fund charges upon the unsold units in phase 2 that were still within the ownership of the appellant as developer to the amount of RM657,134.51.

[46] After a full trial, the learned High Court Judge below ("learned judge") had unsurprisingly, allowed the respondent's claim *in toto* on the following grounds:

(i) the plaintiff-respondent had consistently provided a detailed account and calculation of the receivables that the appellant was statutorily required to transfer to the plaintiff-respondent of which the appellant had (by the appellant's own failure or refusal to respond or refute the respondent's many letters of demand) admitted to. Thus, the defendant-appellant should be estopped from now denying the accuracy of the sums stated in the accounts, and letters of demand issued by the respondent;

(ii) despite the defendant-appellant's insistence that it had already transferred the balance in the sinking fund and maintenance fees accounts, it was apparent that the defendant-appellant had breached numerous statutory duties to account for and appropriately collect the required sinking fund charges and maintenance fees from the defendant itself (as owners of six unsold units) as well as the party who had pledged to absorb the free first-year maintenance fees and sinking fund charges for both the sold and unsold units during the first year post-delivery of VP; and

(iii) consequent to the defendant-appellant's breach of statutory duties to collect and maintain accounts, the defendant-appellant had also breached its statutory duty to appropriately transfer the appropriate balance within the sinking fund and maintenance fees accounts to the plaintiff-JMB before the expiration of the developer's management period.

[47] Dissatisfied with the learned judge's decision to allow the plaintiff's claim, the defendant-appellant filed the appeal before us.

The Appeal Before Us

[48] We have thoroughly perused the memorandum of appeal, the High Court's grounds of judgment, the record of appeal and the parties' respective written submissions and we are of the view that the appeal before us can be disposed of by determining the following two issues:

(i) issue 1: whether or not the learned judge was correct to find that the appellant had breached its statutory duty to appropriately collect the maintenance fees and sinking fund charges for both the sold and unsold units in phase 1 and phase 2 of the condominium; and

(ii) issue 2: whether or not the learned judge was correct to find that the appellant had breached its statutory duty to appropriately transfer the appropriate balance within the sinking fund account and maintenance fee account to the respondent.

Issue 1: Whether Or Not The Learned Judge Was Correct To Find That The Appellant Had Breached Its Statutory Duty To Appropriately Collect The Maintenance Fees And Sinking Fund Charges For Both The Sold And Unsold Units In Phase 1 And Phase 2 Of The Condominium

[49] As we have identified at length earlier, the appellant's gripe was primarily on the issue of quantum. The *factum* of their delay in furnishing the audited account was entirely irrefutable and in fact admitted by the appellant. The appellant contended that the respondent supposedly had failed to prove or furnish sufficient evidence to 'rationalise' the 'discrepancies' within their calculation.

[50] We will deal with this contention later in this judgment. We will first address the appellant's argument that the 'discrepancies' were brought upon by the respondent's wrongful imposition of sinking fund charges and maintenance fees, which were supposed to be paid by the parcel purchasers.

[51] As we have mentioned earlier, the appellant attempted to paint a picture that there was a grave and incomprehensible shortfall of almost RM800,000 between the unsold unit receivables (RM1,091,204.76 personally owed by the appellant as the parcel owner of the six unsold units in phases 1 and 2 of the condominium) and the initial debt amount (RM1,872,625).

[52] The fallacy that the appellant was trying to draw was that the shortfall of RM800,000 was instead receivables from purchasers who have either failed or refused to pay their dues in sinking fund charges and maintenance fees.

[53] The appellant posited the argument that as the developer, the appellant was only statutorily required under s. 12(2) of the SMA to pay the maintenance fees and sinking fund charges for the unsold units that were still within the developer's ownership. We have no qualms as to the appellant's interpretation of s. 12(2) of the SMA. Indeed, we agree that the developer should not bear the losses stemming from the breaches of errant purchasers who do not pay their dues for their respective parcels purchased.

[54] Nevertheless, the facts and circumstances in the appeal before us are glaringly different from the legal position the appellant is staking. Firstly, the entire notion that the appellant was being 'forced' to pay the dues on behalf of purchasers was entirely misleading. It was admitted that there was not any billing for any maintenance fees or sinking fund charges for the first year of the developer's management period post-delivery of VP. Thus, it was not a case of errant purchasers not paying their dues but instead a case of the appellant's own failure or intentional omission to collect the maintenance fees and sinking fund charges for both the sold and unsold units.

[55] This ourright admission of not billing or not collecting falls squarely in line with the admitted fact that the developer had pledged to absorb the free first-year maintenance fees and sinking fund charges on behalf of itself (for the unsold units) and on behalf of the parcel purchasers (for the sold units). So, there cannot be a case of errant purchasers when the developer itself had not bothered to bill and collect the maintenance fees and sinking fund charges from the purchasers.

[56] The facts of the appeal before us were far from a typical case of a failure to pay maintenance fees and sinking fund charges where errant purchasers failed or refused to pay maintenance fees and sinking fund charges (despite the developer having performed its statutory duty to bill and attempt to collect the maintenance fees and sinking fund charges from the errant purchasers).

[57] Here, the developer did not perform its statutory duty under s. 9(3) of the SMA to collect the maintenance fees and sinking fund charges from both the purchasers and itself as developer. And since the non-performance was motivated by the pledge to omit (absorb) the maintenance fees and sinking fund charges, then it is only just and appropriate for the appellant-developer to bear the pledged free first-year maintenance fees and sinking fund charges on behalf of the purchasers (for the sold units) and on behalf of itself (for the unsold units).

[58] It cannot at all be the intention of the law that a developer can, at its own whim and fancy, omit and write off any portion of the maintenance fees and sinking fund charges. Such an arbitrary discretion directly transgresses and is *ultra vires* against the statutory duty to collect under s. 9(3) of the SMA 2013. It is a developer's mandatory duty to ensure that the requisite maintenance fees and sinking fund charges were billed and collected. There is nothing in the SMA that clothes the appellant with any discretion to omit any portion of the maintenance fees and sinking fund charges. Thus, if the developer decided to omit any portion of maintenance fees and sinking fund charges owed by the purchasers, then the developer must absorb the omitted sum and become personally liable to pay the same omitted sum on behalf of the purchasers.

[59] In any case, the appellant-developer ought not to be allowed to approbate and reprobate its stance in this matter. The appellant cannot, on one breath, omit and not collect the maintenance fees and sinking fund charges from the purchasers and on the same singular breath, blames the purchasers for not paying their maintenance fees and sinking fund charges. Estoppel should set in to bar the appellant from adopting two contradictory stances at one singular time. (See *Ho Yau Hong & Ors v. How Yaw Ming & Another Appeal* [2023] CLJU 827; [2023] 1 LNS 827; [2023] MLJU 933; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331; *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16).

[60] We now move on to deal with the appellant's issue on quantum. We are minded that the learned judge had entirely dismissed the appellant's contention on quantum on two main grounds. Firstly, on the ground that the appellant itself had not provided its own alternative calculation and supposed sums to disprove the accuracy and correctness of the respondent's clear calculations. Secondly, on the ground that the appellant should be estopped from negating its prior admissions of the correctness and accuracy of the respondent's calculations and claims:

> **36)** DW 1 in her evidence on behalf of the Defendant did not dispute that this was the sum reflected in the Total Receivable column of the audited report. Under cross examination by learned counsel for the Plaintiff the following evidence was elicited from DW 1
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> *"PP: And after the accounts being audited by Ket & co. you as the director of the Defendant sing off the audited financial report right?*
> *DW 1: Yes, I did sign on it.*
>
> *PP: So when you sign off the audited financial report you also acknowledge that the accounts exhibited therein are correct and accurate right? Just answer yes or no.*
> *DW 1: Yes."*
>
> **33)** Here it will be noticed that the Defendant's own appointed property manager via the 2 Aging Reports had verified the total Receivables as reflected in the Audited Report. These are the contemporaneous supporting documents provided by the Defendant. In the circumstances in my considered view, the Defendant is estopped from denying that these are not the amounts owing. A perusal of the Aging Reports show there is a sum of RM922,086.87 for Phase 1 and RM950,537.85 for Phase 2.
>
> ...

35) As correctly pointed out by the Plaintiff, the neglect of the Defendant in failing to refute the Plaintiff's two letters of demand dated 15.8.2018 and 2.5.2019 has driven this Court to conclude that the Defendant did not dispute these sums that were demanded by the Plaintiff. The inclusion of the supporting documents comprising of detailed calculations, credit notes, invoices and debit notes to reflect the outstanding amount due and owing accompanying the letters of demand would have put the Defendant on notice of the amount claimed by the Plaintiff. In the present case the Defendant acknowledged receipt of the demand letters. The only response given by the Defendant was to inform the Plaintiff that they were in the midst of obtaining instructions from their clients. Nonetheless no further response or payment were received by the Plaintiff. On this issue, remaining silent is not an option. It is unreasonable and illogical for the Defendant to not immediately raise any query and/or objection to the Plaintiff's claim especially here where the amount outstanding is a large sum. The Defendant should have been aware of the grave implications to themselves by not responding to or placing on record their repudiation of the contents of the letters of demand. The defence alleging that it was not liable was only raised after the Writ and Statement of Claim had been served on the Defendant. It followed that the conduct of the Defendant encouraged the Plaintiff to believe that there was no challenge to the details of the account or as to the amount claimed by the Plaintiff. Hence the amount owing by the Defendant as reflected in the Statements of Account prepared by the Plaintiff and received by the Defendant is deemed to have been accepted. In this regard I am reminded of what was said in the case ***of OCBC Bank (M) v Omega Horizon Sdn Bhd & Ors [2004] 7 CLJ 443*** where the High Court held :

> *"...if what they contend is genuine, they should as any reasonable man would grab the earliest opportunity possible rather than remain silent and raise it as a defence only when proceedings are commenced against them."*

[61] The eminent late Gopal Sri Ram JCA (as His Lordship then was) delivering the decision of the Court of Appeal in *Kgn Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611 also expressed the same sentiment that statements of account that goes unanswered or unresponded are deemed to be admitted:

> Encik Darshan Singh, in response to a question put to him by a member of the panel hearing this appeal, **frankly conceded that his client did indeed receive the statements of account of which we have earlier spoken.** It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any liability.
>
> But that is not what happened. **The appellant remained silent, held onto the accounts, and did nothing about it.** The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account.
>
> When asked why his client had kept silent for a rather long period of time, Encik Darshan Singh's response was that his client was a large company and did not do anything until the letter before action was received. We trust that we will be forgiven if we are unable to detect the logic in this response.
>
> We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. **We are left in no doubt that the undisputed facts of this case admit of the conclusion that** the respondent was, by the conduct of the appellant, lulled into the belief that **the appellant had no challenge to the accounts,** leave alone the legal relationship between the parties.
>
> To put it another way, **the appellant, by its silence** coupled with the other circumstances of the case, **encouraged the respondent to believe that it intended to raise no challenge** to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having done so, it ought not to be permitted to now contend otherwise.
>
> **It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so.** An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and is now beyond question. *See Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331.
>
> (emphasis added)

[62] We are in full agreement with the learned judge's findings and the above precedent of the Court of Appeal. Apart from the above *ratio decidendi,* we are beckoned to highlight that the appellant's own witnesses had testified that they have admitted and verified the accuracy of the respondent's figures in the audited report and the aging reports. The appellant's own directors had

executed a statutory declaration admitting and verifying the accounts contained within the audited report. Not only that, the appellant's own witness had admitted that the aging reports (which were prepared for the purposes of preparing the accounts for Ket & Co's auditing) were prepared by the appellant's own appointed property management agent, JL Facilities Sdn Bhd. Thus:

(i) these documents (which were marked as Part B documents) were the appellant's own documents and not even the respondent's documents; and

(ii) these documents were prepared by independent third-party entities who were also appointed by none other than the appellant itself (and have no personal interest whatsoever in this case).

[63] Therefore, on top of not refuting the respondent's letters of demand and statements of account, the appellant's own directors have admitted the accuracy and correctness of the respondent's accounts, figures, and calculations. It would certainly be gravely unjust if we were to allow the appellant to now contradict its own prior admissions and acknowledgment.

[64] Thus, considering all of the above deliberations under this heading, we answer issue 1 in the positive. The learned judge was astutely correct in finding that the appellant had breached its statutory duty to appropriately collect the maintenance fees and sinking fund charges for both the sold and unsold units in phase 1 and phase 2 of the condominium.

Issue 2: Whether Or Not The Learned Judge Was Correct To Find That The Appellant Had Breached Its Statutory Duty To Appropriately Transfer The Appropriate Balance Within The Sinking Fund Account And Maintenance Fee Account To The Respondent

[65] Considering our positive answer in issue 1 above, it can only necessarily follow that we agree with the learned judge that the appellant had failed to duly transfer the appropriate balance within the maintenance fees account and sinking fund account to the respondent-JMB.

[66] Despite the appellant's insistence that it had already transferred all of the monies from the two accounts to the respondent, the glaring balance of receivables admitted to not have been transferred to the respondent can only mean that the appellant had not properly accounted for and/or collected the appropriate maintenance fees and sinking fund charges that was owed by the appellant itself.

[67] The alternative possibility (that the appellant had indeed collected the appropriate maintenance fees and sinking fund charges) is equally damning against the appellant as it would mean that the appellant had misappropriated the collected maintenance fees and sinking fund charges. In these two

possible scenarios, there was a gross failure to collect maintenance fees and sinking fund charges or there was a gross failure to transfer collected maintenance fees and sinking fund charges to the respondent. In both scenarios, the appellant would still be in breach of its statutory duties and the appellant would still owe the same amount of monies to the respondent-JMB.

[68] Thus, considering all of the above deliberations under this heading, we also answer issue 2 in the positive. The learned judge was indeed correct in finding that the appellant had breached its statutory duty to appropriately transfer the appropriate balance within the sinking fund account and maintenance fee account to the respondent.

Our Decision

[69] It was altogether clear to us that there were no appealable errors whatsoever in the learned judge's judicial appreciation of the facts, the prevailing laws, and the evidence that were tendered before the High Court.

[70] Succinctly, it was altogether misconceived for the appellant to contend that the sums claimed by the respondent were all uncollected or unpaid amounts that was owed by the purchasers of sold units. By the appellant's own admission, the appellant indeed had owed and had not collected from itself a majority of the sum claimed for unpaid and uncollected maintenance fees and sinking fund charges for the unsold units. The remainder of the sum owed was the pledged free first year uncollected maintenance fees and sinking fund charges for both the sold and unsold units in which the appellant had 'omitted' (and absorbed).

[71] We must reiterate that a mere intentional omission from collecting the uncollected maintenance fees and sinking fund charges does not automatically 'erase' the statutory duty to pay and duty to collect. Since the appellant was more than willing to 'absolve' or 'liberate' the purchasers from their duty to pay the first year uncollected maintenance fees and sinking fund charges, it shall be incumbent upon the appellant to absorb the uncollected sums and subsequently pay or transfer the same to the respondent-JMB before the expiration of the developer's management period.

[72] Based on the aforementioned reasons, we are of the considered view that there is no plain error of fact/law committed by the learned judge to warrant our intervention. Thus, the appellant's appeal is devoid of merit and must be dismissed with costs. Accordingly, the decision of the High Court dated 5 January 2023 is affirmed.

[73] We also order costs of RM30,000 to be paid by the appellant to the respondent (subject to allocatur fee).